Supreme Court of Kentucky

2015-SC-000462

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET — APPELLANT

v.

ON REVIEW FROM COURT OF APPEALS
NOS. 2013-CA-001695 AND 2013-CA-001742
FRANKLIN CIRCUIT COURT NO. 11-CI-01613

KENTUCKY WATERWAYS ALLIANCE,
SIERRA CLUB, VALLEY WATCH,
SAVE THE VALLEY, AND
LOUISVILLE GAS AND ELECTRIC COMPANY — APPELLEES

BRIEF FOR APPELLANT, ENERGY AND ENVIRONMENT CABINET

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CERTIFICATE OF SERVICE

It is hereby certified that copies of this Brief for Appellant were mailed this 11th day of April, 2016 to Joe F. Childers, Joe F. Childers & Associates, The Lexington Building, 201 W. Short St., Ste. 300, Lexington, KY 40507; Nathanial Shoaff, Andrea Issod, Sierra Club, 85 Second St., Second Fl., San Francisco, CA 94105; Sheryl G. Snyder, Jason P. Renzelmann, Frost Brown Todd LLC, 400 W. Market Street, 32nd Floor, Louisville, KY 40202-3363; John C. Bender, R. Clay Larkin, Dinsmore & Shohl, LLP, Lexington Financial Center, 250 W. Main Street, Ste. 1400, Lexington, KY 40507; Amy Feldman, Franklin Circuit Court Clerk, Franklin County Courthouse, 222 St. Clair St., Frankfort, KY 40601; and Hon. Phillip Shepherd, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair St., Frankfort, KY 40601; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Hon. Janet L. Stumbo, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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INTRODUCTION

The Commonwealth of Kentucky, Energy and Environment Cabinet, appeals the Opinion of the Court of Appeals affirming the decision of the Franklin Circuit Court, which remands a permit issued by the Cabinet to Louisville Gas & Electric Company for the discharge of treated wastewater to the Ohio River for further consideration of effluent limitations standards.

STATEMENT CONCERNING ORAL ARGUMENT

The Cabinet believes oral argument would be helpful to the Court because of the complex technical and legal issues raised in this appeal, and for that reason would welcome the opportunity to present oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. LEGAL AND FACTUAL BACKGROUND

Louisville Gas and Electric Company ("LG&E") operates a power generating station in Trimble County, Kentucky ("Trimble" or "the facility") that discharges treated wastewater into the Ohio River. The Trimble plant comprises two generating units: Unit 1, in operation since 1990, and Unit 2, which began operation in 2011. Both units use flue gas desulfurization[1] ("FGD") control devices known as "wet scrubbers" to remove pollutants from exhaust created by coal combustion to generate electricity. The wet scrubbing process creates a wastewater stream containing the pollutants removed from the flue gas. The Trimble plant FGD wastestream is routed through an internal outfall (Outfall 006) to Trimble's Gypsum Storage Basin where it is treated by sedimentation – a process of settling by gravity – before discharging to Outfall 002 and then to the Ohio River.

The Clean Water Act ("CWA" or "the Act")[2] prohibits the discharge of a pollutant from a point source to waters of the United States unless in compliance with the Act, including the requirement that a discharge be permitted in accordance with 33 U.S.C. § 1342, or the "National Pollutant Discharge Elimination System" ("NPDES"), 33 U.S.C. § 1311(a). Dischargers must comply with effluent limitations established in NPDES or KPDES permits, which may impose two types of limitations on the constituents of wastewater discharges: technology-based effluent limits, and where

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[1] Flue Gas Desulfurization: A technology that employs a sorbent, usually lime or limestone, to remove sulfur dioxide from the gases produced by burning fossil fuels. From EPA "Terms of Environment Glossary," https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=Terms%20of%20Env%20(2009).

[2] Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 to 1387; Clean Water Act §§ 201-607.

technology-based limits are not sufficiently protective of water quality, water quality-based effluent limits.[3]

Technology-based effluent limits are based on national Effluent Limitation Guidelines ("ELGs"),[4] which the Act requires the United States Environmental Protection Agency ("EPA") to promulgate as regulations, or where EPA has not yet promulgated applicable national ELGs, on the permitting agency's best professional judgment ("BPJ").[5] EPA establishes ELGs for categories of industrial dischargers. The ELGs are progressively more stringent based on the degree of effluent reduction or control that can be achieved using various levels of pollution control technology.[6]

In 1982, EPA promulgated ELGs for the Stream Electric Power Generating Point Source Category.[7] These ELGs are codified at 40 CFR Part 423 and establish limitations on pH, Total Suspended Solids (TSS), and oil and grease. The waste streams to be controlled by the 1982 ELGs include low volume wastes.[8] Specifically identified as a low volume waste are "wastewaters from wet scrubber air pollution control systems."[9] Thus, the waste stream from Trimble's FGD wet scrubbers is specifically addressed by the promulgated ELGs for the Steam Electric Power Generating Point Source Category.

The Act also requires that EPA annually review and, as needed, revise ELGs.[10] In 2005, EPA initiated a study of the Steam Electric Power Generating Point Source Category ELGs to determine if they should be revised.[11] In 2013, after extensive analysis

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[3] 33 U.S.C. §§ 1311(b) and (b)(1)(C).
[4] 33 U.S.C. § 1314.
[5] 33 U.S.C. § 1314(b)(2)(B).
[6] 33 U.S.C. §§ 1314(b) and 1311(b).
[7] 47 FR 52304 (Nov. 19, 1982).
[8] 47 FR 52304, 52297.
[9] Id.
[10] 33 U.S.C. § 1314(b).
[11] "Steam Electric Power Generating Point Source Category: Final Detailed Study Report" (October 2009).

including field studies and surveys of 733 steam electric power plants to obtain technical and economic information concerning constituents in waste water and the efficacy of various treatment technologies, EPA published a proposed rule revising ELGs for the category.[12] On November 3, 2015, EPA published its final revised national ELGs for the Steam Electric Power Generating Point Source Category, which became effective on January 4, 2016. The revised ELGs continue to address only the pollutants of concern, and specifically recognized the incredible burden that would be placed upon regulators to use a BPJ analysis for each pollutant in this waste stream category. Furthermore, the revised ELGs will not become mandatory for existing sources until 2018 at the earliest.

In 2007, LG&E applied to the Cabinet to renew the Trimble permit. In developing the permit, the Cabinet's permit writer considered how Trimble's FGD discharge was subject to EPA's promulgated ELGs for the Stream Electric Power Generating Point Source Category at 40 CFR Part 423.15. Those ELGs did not require permit limits for metals in the waste stream. Nevertheless, the permit writer imposed a requirement that LG&E monitor for Total Recoverable Metals and submit the results to the Cabinet, in order to determine if additional limits should be required. LG&E was also required to demonstrate "no detection of priority pollutants" in its final discharge.[13] The Cabinet also imposed additional water quality-based limit for Whole Effluent Toxicity to control those pollutants for which the concentration in the plant's discharge was not known at the time the permit was issued, including dissolved metals. Finally, the permit included a "re-opener" clause so that the Cabinet could impose new or additional effluent

[12] 78 FR 34432-01.
[13] The term "priority pollutants" means the 126 priority pollutants listed in 40 CFR Part 423.

limits if warranted based on Trimble's monitoring data, or if a new EPA-promulgated ELG became applicable during the time Trimble's permit was in effect.

The Cabinet published the draft permit for public comment. EPA commented on the draft; the Cabinet modified the permit in response and re-noticed the draft for public comment. EPA reviewed the draft and notified the Cabinet by letter that it had no objection to the permit conditions.[14]

II. PROCEDURAL HISTORY

The Kentucky Waterways Alliance, Sierra Club, Valley Watch, and Save the Valley ("Appellees") filed a petition with the Cabinet's Office of Administrative Hearings challenging the Cabinet's issuance of the permit renewal. Appellees argued that the promulgated ELGs do not apply, and that the Cabinet should have conducted a BPJ analysis to impose additional effluent limits in the permit.

On September 23, 2010, the Hearing Officer filed an Order granting the Cabinet's Motion for Partial Summary Disposition, finding that the Trimble FGD wastewaters are subject to an applicable ELG and that, when an ELG applies, the Cabinet is not required to impose additional case-by-case BPJ limits.[15] On December 1, 2010, the Cabinet's Secretary agreed with the Hearing Officer's findings and issued a Final Order of the Cabinet.[16]

The Appellees then appealed to the Franklin Circuit Court. On September 10, 2013, the Circuit Court, clearly influenced by the fact that EPA's ELG was around 30 years old, concluded that the Cabinet had erroneously failed to use its BPJ to develop

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[14] Administrative Record, Docket #30 (Attachment 9), September 9, 2009 letter C. Espy to L. Sowder, attached as Appendix 6.

[15] The Hearing Officer's Order Granting Motion for Partial Summary Disposition is attached as Appendix 3.

[16] The Secretary's Order is attached as Appendix 4.

numeric permit limits for individual metals in the waste stream. The Opinion ignored the fact that EPA's ELG for this category (which did not require such numeric permit limits) was in effect and applicable.[17]

On July 29, 2015, the Court of Appeals in a 2-1 ruling (the "Majority Opinion) affirmed.[18] The Majority agreed with the trial court that the ELG only applied to certain pollutants in the low volume waste, and thus a BPJ analysis was required for pollutants not specifically regulated in the ELG.

The Cabinet's Petition for Rehearing was denied on July 29, 2015.[19] The Cabinet filed its Motion for Discretionary Review on August 28, 2015.

ARGUMENT

I. The Majority Opinion directly contradicts regulation, EPA guidance documents, and applicable case law.

A. *The Majority Opinion directly contradicts the plain language of the controlling regulation.*

In its Majority Opinion, the Court concluded that because "[t]he 1982 ELG was expressly inapplicable to thirty-four toxic pollutants,"[20] the Cabinet was *required* to use case-by-case BPJ to establish technology-based effluent limitations for those pollutants. The Majority Opinion's conclusion that the ELG is "expressly inapplicable" to those pollutants is contrary to the plain language of 40 CFR 125.3(c),[21] by which EPA established what it means for an ELG to be "applicable" to a waste stream.

In 40 CFR 125.3(c), EPA provides states with three methods for imposing technology-based effluent limitations in permits. The first method is by "[a]pplication of

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[17] The Franklin Circuit Court's Opinion and Order is attached as Appendix 5.
[18] The Majority Opinion is attached as Appendix 1.
[19] The Order denying the Petition for Rehearing is attached as Appendix 2.
[20] Id. at p.18.
[21] 40 CFR 125.3(c) is attached as Appendix 7.

EPA-promulgated effluent limitations . . . to dischargers by category . . . . These effluent limitations are not applicable to the extent that they have been remanded or withdrawn."[22] By implication, if an EPA-promulgated ELG has not been remanded or withdrawn, then it is "applicable." The current ELG has not been remanded or withdrawn; therefore, it is "applicable." The Circuit Court suggested there would be an automatic expiration date on an ELG, but that is simply not the case. The regulation is clear, that the EPA itself must act to remand or withdraw the ELG; unless EPA does so, the ELG remains applicable and its limits must be applied.

The regulation also directs that, when an ELG is "applicable," case-by-case limits *are not to be applied.* 40 CFR 125.3(c)(2) provides that effluent limitations may be imposed "[o]n a case-by-case basis . . . *to the extent that EPA-promulgated effluent limitations are inapplicable . . .*" (emphasis added). Unless an EPA-promulgated ELG has been remanded or withdrawn, the ELG is applicable. Thus, states are to apply *that ELG* when they impose technology-based effluent limitations, and case-by-case effluent limitations are not required.[23]

Both the Circuit Court and the Majority Opinion relied on 40 CFR 125.3(c)(3) to require the Cabinet to impose case-by-case limits on certain metals in the waste stream. However, by its terms, this paragraph applies "[w]here promulgated effluent limitation guidelines *only apply* to certain aspects of the discharger's operation, or to certain

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[22] 40 CFR 125.3(c)(1).

[23] Taken literally, 40 CFR 125.3(c) might be found even to *foreclose* a state from using discretion to impose case-by-case effluent limitations where an EPA-promulgated effluent limitation is applicable. There is some case authority for such a reading (which is not at issue in this case). However, the Majority Opinion employs essentially the opposite reading, which is that the Cabinet has *no discretion not to impose* case-by-case effluent limitations, even where a nationwide ELG *is* applicable. The Cabinet is aware of no case authority (other than the Majority Opinion) interpreting 40 CFR 125.3(c) in this manner, and such an interpretation is directly at odds with the clear language of the regulation. One court has recently rejected the Majority Opinion's analysis. *Natural Res. Def. Council v. Pollution Control Bd.*, 2015 IL App (4th) 140644, 2015 WL 4464582.

pollutants . . ." (emphasis added).[24] As discussed above, the current ELG does not "only apply" to certain pollutants – the ELG is applicable to the facility's entire discharge and is to be applied to establish effluent limitations.

Even if 40 CFR 125.3(c)(3) were relevant here because the ELGs did "only apply" to certain aspects of the discharger's operation, or to certain pollutants, as the Majority concluded, then any "other aspects or activities" are only "*subject to regulation* on a case-by-case basis . . . ."[25] EPA could have provided that, in such a case, the other aspects or activities "*shall be regulated* on a case-by-case basis," but no such language appears in the regulation.

For the foregoing reasons, the Majority Opinion's cornerstone conclusion that "[t]he 1982 ELG was expressly inapplicable to thirty-four toxic pollutants"[26] is contrary to the regulation that established what it means for an ELG to be "applicable" to a waste stream.

B. The Majority Opinion erroneously disregards EPA guidance on application of its pollutant regulation standards.

In his partial dissent, Judge Maze correctly pointed out that EPA's NPDES Permit Writers Manual instructs that a case-by-case BPJ review by a state permit writer is not necessary where EPA has considered (when developing an ELG) whether to require specific limits for certain toxic pollutants it was aware were present in the waste stream.[27] Here, when promulgating the ELG in 1982, EPA was aware of the presence of certain metals in the waste stream, but determined that numeric limits were not required in the

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[24] 40 CFR 125.3(c)(3)
[25] 40 CFR 125.3(c)(1).
[26] Majority Opinion, at p. 17.
[27] Majority Opinion at p.19; NPDES Permit Writers Manual, Sept. 2010 at p.5-45 to 5-46 (available at http://water.epa.gov/polwaste/npdes/basics/upload/pwm_chapt_05.pdf).

ELG because "[the metals] are present in amounts too small to be effectively reduced by technologies known to the Administrator."[28] This is quite different from the Circuit Court's characterization of the metals as "undetectable."[29] EPA was able to detect the pollutants and was aware they were present in a typical low volume waste stream, but determined that numeric limits were not appropriate and thus did not include such limits in the ELG.

While this EPA guidance is not binding on the Cabinet or the Court, it is an instructive interpretation of a component of the program EPA is charged to administer, and serves as a basis for the Cabinet's interpretation of the applicable component of its own KPDES program. As such, that interpretation was entitled to – but was not accorded – deference by the courts below.[30]

Further, the Majority Opinion would eviscerate the Clean Water Act's goal of national uniformity in the application of an ELG for wastewater discharge. If the Majority Opinion were to stand, the Cabinet would be required to develop particularized technology-based treatment requirements ("state ELGs"), plant-by-plant, for each waste stream constituent not specifically regulated by an ELG. Courts have long held that ELGs must not "vary from plant to plant"[31] because such an approach would defeat the Act's goal of national uniformity. If all states were required to develop case-by-case technology-based effluent limitations even where there is an EPA-promulgated ELG for the waste stream, a regulatory patchwork quilt would develop and Congress's goal of national uniformity would be defeated.

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[28] 47 Fed. Reg. 52,290-01, 52,303 (Nov. 19, 1982).
[29] Circuit Court Opinion at p.9.
[30] The issue of deference is discussed in Section III, infra.
[31] *United States Steel Corp. v. Train*, 556 F.2d 822, 844 (7th Cir. 1977).

Also, since developing an ELG requires laborious and difficult engineering, economic, technical, and factual analysis,[32] the Act gives EPA the responsibility of doing this on behalf of the nation.[33] This is not the responsibility of the states, nor is it the responsibility of the Court.

And, if a case-by-case approach were to be required merely because too many years have passed since EPA last considered whether an ELG should be updated, states would be left to guess when they should take action. States already have a bright-line standard for determining whether to use case-by-case BPJ, or a national ELG, to establish technology-based effluent limitations: the standard provided by the express terms of the regulation itself. If an EPA-promulgated ELG is "applicable" because it has not been remanded or withdrawn, then *it is to be applied* by the permitting authority to establish effluent limitations.

Moreover, where EPA fails to review and revise its ELGs within the time provided by the Act,[34] then the *federal court* has subject matter jurisdiction to entertain a citizen suit seeking to force EPA to perform that duty.[35] In fact, such a case was filed concerning this ELG raising that very issue.[36] If any forum were to address EPA's delay, it should be that forum.

C. The Majority Opinion's conclusion is contrary to applicable case law.

At the outset of its analysis, the Court acknowledged "[i]t is uncontested among the parties that a case-by-case, best professional judgment analysis is not required under

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[32] In the process of revising this steam electric power plant ELG, EPA conducted at least 68 site visits in 22 states from 2007 to 2013, performed numerous industry surveys, and conducted on-site wastewater sampling at numerous facilities. *See* 78 Fed. Reg. at 34,440-45.
[33] 33 U.S.C. § 1314(m); 33 U.S.C. § 1311(d).
[34] *See* 33 U.S.C. § 1311(d).
[35] 33 U.S.C. § 1365(a)(2).
[36] *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012) aff'd in part, appeal dismissed in part sub nom (on grounds of standing), *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013).

the Act when a nationwide ELG sets limits for a category of dischargers."[37] That matter was uncontested among the parties because this is inarguably a correct statement of the law.

First, under Section 402 of the CWA, BPJ limits are not required when a wastewater discharge is subject to an existing ELG. Section 402(a)(1) authorizes the use of BPJ (described therein as "such conditions as the Administrator determines are necessary to carry out the provisions of this chapter"), but provides that BPJ is to be used to establish limits only "prior to the taking of necessary implementing actions relating to all such requirements," which includes EPA's promulgation of an ELG that applies to that discharge.[38] That section has been found "*to preclude the establishment of BPJ limits once applicable effluent guidelines are in place.*"[39]

In *Nat. Res. Def. Council,* industry and environmental group sought review of orders of EPA dealing with state assumption of NPDES permitting program. The court examined the CWA's legislative history and found that it confirmed the plain reading of the statute: "Like the statutory language itself, the passage referred to by Industry [citation omitted] tells us that EPA is to issue permits containing BPJ limits only until national guidelines are in place. H.R.Rep. No. 911, 92d Cong., 2d Sess. 126 (1972),

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[37] Majority Opinion at p.12. Here, the category is "low volume waste" from wet scrubbers at a steam electric power plant. 47 Fed. Reg. 52,290, 52,303 (November 19, 1982) (codified at 40 CFR Parts 125 and 423).

[38] 33 USC § 1342(a)(1).

[39] *Nat. Res. Def. Council, Inc. v. U.S.E.P.A.,* 859 F.2d 156, 200 (D.C. Cir. 1988) ("As we read it, section 402(a)(1) acts only to preclude the establishment of BPJ permit limits once applicable effluent guidelines are in place. *Id.* § 1342(a)(1). It provides a broad framework for the NPDES program; in orderly fashion, the statute in effect creates a two-phase process (BPJ permit issuance, then national effluent guidelines)"). See also *NRDC v. Train,* 510 F.2d 692, 709-710 (D.C. Cir. 1974)("*Prior to the promulgation of effluent limitations* under section 301, the director of a state program is instructed merely to impose such terms and conditions in each permit as he determines are necessary to carry out the provisions of the Act" (emphasis added).

reprinted in 1972 Legislative History at 813."[40] Noting that CWA Sections 301 and 304 "do indeed require adoption and implementation of *nationally uniform* effluent limitations guidelines for industrial categories and classes of point sources," the court determined that "one congressional purpose in this respect was clear: the Article I branch sought to maximize horizontal equity, or, in the words of Senator Muskie, 'to assure that similar point sources with similar characteristics . . . meet similar effluent limitations.' Legislative History at 172."[41]

As far as the Cabinet is aware, no other court has interpreted 40 CFR 125.3(c) to require a state agency to set case-by-case discharge limits where an EPA-promulgated ELG is applicable.

II. The Majority Opinion's does not properly take into account the water quality-based standards applicable to the KPDES permitting program.

This case has focused on the technology-based effluent limitations contained in the ELG at issue. However, under the Kentucky Pollutant Discharge Elimination System ("KPDES") program administered by the Cabinet, additional standards, known as water-quality-based standards, apply to discharges of pollutants to waters of the Commonwealth. Specifically, 401 KAR 10:031 Section 2 contains specific standards – minimum criteria – that are applicable to *all* surface waters in the Commonwealth. Section 6 of that regulation contains specific numeric limits on allowable in-stream concentrations of a long list of pollutants, including the toxic metals of understandable concern here: arsenic, mercury, and selenium. Facts about Kentucky's water quality-

[40] *Id.*
[41] *Id.*

based standards are material and are in the record.[42] The Majority Opinion overlooked those material facts.

As is also clear from the record, the Cabinet determined through analysis that the discharge to the Ohio River did not have the reasonable potential to cause or contribute to an exceedance of Kentucky's water quality standards. Nevertheless, the Cabinet imposed a permit requirement for "Whole Effluent Toxicity" testing to ensure that the discharge was not toxic, and imposed a permit requirement that LG&E test the discharge for metals and report the data to the Cabinet. A permit condition provided that the Cabinet could use the data to reopen the permit to establish additional permit effluent limitations if warranted.

So, the Majority Opinion's impression that the pollutants in question are effectively unregulated (because it believed that EPA had allowed the ELG to become obsolete) is simply not accurate. The Majority Opinion overlooked material facts in the record: technology-based effluent limitations are not the only effluent limitations that apply to these discharges; water-quality based standards also apply.

III. The Court of Appeals substituted its judgment for the Cabinet's, and failed to defer to the Cabinet's interpretation of controlling regulations.

Development of LG&E's Trimble permit involved issues of both fact and law, as well as the exercise of agency discretion. This court reviews issues of law *de novo*.[43] However, the Cabinet is delegated the authority to provide for the prevention, abatement, and control of all water, land, and air pollution, and to issue or deny permits to discharge

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[42] Sara Beard, the writer of LG&E's permit, testified in her deposition regarding the existence of water quality-based standards and their applicability generally to discharges of toxic metals to surface waters. Administrative Record, Docket # 56, Deposition of Sara Beard (hereinafter "Beard Depo") at pp. 138-39. See also Expert Report of Sara Beard, P.E. (pp. 3-5), Administrative Record, Docket #25, attached as Appendix 8.

[43] *Aubrey v. Office of the Attorney General,* 994 S.W.2d 516, 519 (Ky. App. 1998).

to the waters of the Commonwealth "under such conditions as the cabinet may prescribe."[44] The Cabinet has been developing and issuing KPDES permits in compliance with the Clean Water Act as incorporated into state law for more than 30 years. Regarding environmental permitting, the Cabinet is "entitled to great deference in interpreting [its] own statutes and regulations, at least where those interpretations do not contravene the law."[45] Moreover, "If a statute is ambiguous, the courts grant deference to any permissible construction of that statute by the administrative agency charged with implementing it," whether or not the Court would arrive at the same construction *de novo.*[46] The Court of Appeals previously extended such deference to the Cabinet's interpretation of the statutes and regulations governing the KPDES permit program.[47]

"As to questions of fact or the exercise of discretion by an administrative agency, judicial review is limited to whether the agency's decision was supported by substantial evidence or whether the decision was arbitrary or unreasonable."[48] An exercise of administrative discretion is "unreasonable" when, "under the evidence presented there is no room for difference of opinion among reasonable minds."[49] The Cabinet's finding in this matter – that no additional BPJ effluent limitations on Trimble's FGD waste stream were necessary – was based on all available information and on application of EPA's promulgated ELG. The finding was not arbitrary, but was reasonable and entitled to deference.

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[44] KRS 224.10-100(5) and (19).
[45] *Morgan v. Natural Res. and Envtl. Prot. Cabinet,* 6 S.W.3d 833, 842 (Ky. App. 1999).
[46] *Ky. P.S.C. v. Commonwealth,* 320 S.W.3d 660, 668 (Ky. 2010).
[47] *Commonwealth v. Sharp,* 2012 WL 1889307, at *11 (Ky. App. May 12, 2012) (reversing Franklin Circuit Court for "substituting its own preferred interpretation of the statute over that of the Secretary, despite the fact that the agency's interpretation was . . . reasonable . . ."). Unpublished Opinion cited pursuant to CR 76.28(4)(c), copy attached as Appendix 9.
[48] *Comm. Cabinet for Human Resources v. Jewish Hospital Healthcare Services, Inc.,* 932 S.W.2d 388, 390 (Ky.App., 1996).
[49] *Thurman v. Meridian Mutual Insurance Co.,* 345 S.W.2d 635, 639 (Ky. 1961).

Regarding the Cabinet's factual findings, "an administrative agency's findings of fact are reviewed for clear error."[50] The court is to presume the Cabinet's determination that the permit was properly issued is correct and the burden of proving the Cabinet's decision arbitrary was on Petitioners.[51] Appellees, as Petitioners in the administrative proceedings below, had the burden of establishing a prima facie case and also the ultimate burden of persuasion as to their claims.[52] Where the Secretary, as fact-finder below, denied relief to the party with the burden of proof or persuasion, "the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it."[53] Appellees had both the burden of proof and burden of persuasion in challenging the Cabinet's permitting determination below, and there is no compelling evidence in the administrative record rendering arbitrary the Cabinet's decision denying them relief.

"The judicial standard of review of an agency's decision . . . is largely deferential" and the court is not to reconsider or reinterpret the merits of the claim "nor to substitute its judgment for that of the agency as to the weight of the evidence."[54]

When a regulatory agency such as the Cabinet applies its considerable expertise and experience to the difficult balancing required in issuing permits, courts

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[50] *Hutchison v. Kentucky Unemployment Insurance Comm., 329* S.W. 3d 353, 356 (Ky. App. 2010).
[51] *Morgan,* 6 S.W. 3d at 842 (one challenging agency order must demonstrate agency decision was not supported by substantial evidence); *see, e.g. Kentucky Central Life Insurance Co. v. Stephens,* 897 S.W.2d 583, 589 (Ky., 1995) (burden of proof is on those contesting Insurance Commissioner's action).
[52] 401 KAR 100:010 Section 13(9).
[53] *McManus v. Kentucky Retirement Systems,* 124 S.W. 3d 454, 458 (Ky. App. 2003); such denial is arbitrary only if the record as a whole compels a contrary decision "in light of the substantial evidence therein." *Bourbon County Board of Adjustment v. Currans,* 873 S.W. 2d 836, 838 (Ky. App. 1994).
[54] *Louisville/Jefferson County Metro Government v. TDC Group, LLC, d/b/a Molly Malone 's,* 283 S.W.3d 657, 663 (Ky. 2009) (citation omitted).

should give great deference to the agency's determination.[55] Especially where a technical field is undergoing change, such as here– where new ELGs were in development for Trimble's point source category including for FGD waste streams– the Court must afford an extra measure of deference to the Cabinet's expertise.[56]

In reaching its conclusion here, the Majority substituted the court's own interpretation of 40 CFR 125.3(c) for the Cabinet's interpretation (as did the Circuit Court), overlooking controlling decisions. The Cabinet's interpretation of this governing regulation does not contravene the law; thus, it should have been respected and given effect.

The Cabinet's interpretation is based on the language of 40 CFR 125.3(c)(1), (2), and (3). The Majority Opinion's interpretation nullifies 40 CFR 125.3(c)(1) because its reading would require the Cabinet to impose case-by-case limits even where a national ELG is applicable. Thus, the Majority Opinion contradicts the language of the regulation, while the Cabinet's interpretation reads the regulation as a whole and harmonizes the paragraphs, giving the necessary effect to the explicit directive in 40 CFR 125.3(c)(1) to impose technology-based effluent limitations in permits by "[a]pplication of EPA-promulgated effluent limitations . . . to dischargers by category."

Also, as discussed in Section I(C) above, the Cabinet's interpretation of the regulation is consistent with the interpretation courts have repeatedly held is compelled by the plain language of the Act.[57]

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[55] *In the Matter of Stream Encroachment Permit No. 0200-04-0002,* 402 N.J. Super. 587, 597, 955 A.2d 964, 970 (N.J. Super. Ct. App. Div., 2008) ("We may not second-guess those judgments of an administrative agency which fall squarely within the agency's expertise").

[56] *See, Earthlink, Inc. v. F.C.C.,* 462 F.3d 1, 10 (D.C. Cir., 2006) ("an extra measure of deference is warranted where the decision involves a 'high level of technical expertise' in an area of 'rapid technological and competitive change'")(internal citations omitted).

[57] *(See discussion at pp. 10-11, infra.)*

The Cabinet's interpretation is consistent with the CWA's goal of national uniformity in the application of EPA-promulgated ELGs.

For these reasons, the courts below should have deferred to the Cabinet's (and EPA's) interpretation of this regulation.

IV. The Court's holding imposes an impossible burden on the Cabinet.

As courts have found, EPA cannot always even *identify* every pollutant in a waste stream, much less establish scientifically-defensible effluent limitations for all of them.[58] If the largest and most well-funded environmental agency in the nation cannot identify or establish limits for every constituent in a waste stream for every category of discharge, states obviously cannot do so. The Majority Opinion overlooked this material fact when it concluded that the Cabinet was required to set additional case-by-case effluent limitations, on an ad-hoc basis, where there was an applicable ELG. Thus, the implications of this ruling, which requires the Cabinet to undertake efforts that took EPA about *ten years* to accomplish, are extraordinarily problematic given the limits on the Cabinet's time and resources. In fact, this issue is one of the reasons EPA decided not to impose this extraordinary burden on the states in the recently-published new ELGs.

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[58] *See, e.g., Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 287-88 (6th Cir. 2015) ("Since any given wastestream may contain hundreds of pollutants, such a permit-writing approach would be unduly burdensome and costly, and ultimately, impractical. As the Agency has acknowledged: 'it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants.'")(internal citation omitted). *See also, NRDC v. EPA*, 822 F.2d 104, 125 (D.C. Cir. 1987) (EPA "frequently does not impose specific effluent guidelines for certain pollutants, especially in regulating toxics, but instead treats other "regulated" pollutants as "indicators" of the probable level of the unregulated pollutants because the model treatment technology (the basis for effluent guidelines) removes both); *Reynolds Metals Co. v. EPA*, 760 F.2d 549, 557 (4th Cir. 1985).

V. The new ELG reaffirms that the Cabinet should not have been required to use case-by-case BPJ to establish technology-based effluent limitations in LG&E's permit.

On November 3, 2015, EPA published its new *Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*.[59] In the new ELG, EPA made several things abundantly clear.

First, as the Cabinet has consistently argued in these proceedings, EPA (after considering numerous public comments from industry, other states, and environmental groups) agreed that requiring states to set case-by-case site-specific BPJ limits for constituents not specifically limited in an ELG would impose an unreasonable burden on them. In the new ELG, EPA determined *not* to impose such a requirement on state and local permitting authorities, stating:

> Sections 301 and 304 of the CWA require EPA to develop nationally applicable ELGs based on the best available technology economically achievable, taking certain factors into account. EPA decided that it would not be appropriate to leave FGD wastewater requirements in the final rule to be determined on a BPJ basis because there are sufficient data to set uniform, nationally applicable limitations on FGD wastewater at plants across the nation. Given this, *BPJ permitting of FGD wastewater would place an unnecessary burden on permitting authorities, including state and local agencies, to conduct a complex technical analysis that they may not have the resources or expertise to complete*. BPJ permitting of FGD wastewater would also unnecessarily burden the regulated industry because of associated delays and uncertainty with respect to permits.[60]

Thus, the new ELG reaffirms and supports the Cabinet's position here, and undermines entirely the rulings below as inconsistent with applicable law.

Second, existing steam electric power plants will not even be required to meet new Best Available Technology ("BAT") limits until, *at the earliest*, November 1, 2018, because of the "magnitude and complexity of process changes and new equipment

[59] 80 FR 67838-01.
[60] 80 FR at 67852 (emphasis added).

installations that would be required at facilities to meet the rule's requirements."[61] The new ELG states:

> . . . where BAT limitations in this rule are more stringent than previously established BPT limitations, *those limitations do not apply until a date determined by the permitting authority that is as soon as possible beginning November 1, 2018 (approximately three years following promulgation of this rule), but that is also no later than December 31, 2023 (approximately eight years following promulgation)* . . . . Consistent with the proposal and supported by many commenters, the final rule takes this approach in order to provide the time that many facilities need to raise capital, plan and design systems, procure equipment, and construct and then test systems.[62]

Thus, BAT limits on pollutants such as those at issue here will not apply for more than two years from now at minimum, so the limits clearly did not apply in 2010 when the Cabinet issued the challenged permit to LG&E for the Trimble plant.

Third, under the new ELG, EPA does not require the regulator to set a limit for every toxic constituent (or pollutant of concern, "POC") in a waste stream. The new ELG only requires limits for "indicator pollutants," which are those whose method of treatment ensures the removal of other POCs with common treatment methods and sources.[63]

EPA's approach in the new ELG is consistent with the Cabinet's position here, and entirely inconsistent with the rulings below.

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[61] 80 FR at 67854.
[62] 80 FR 67854 (emphasis added).
[63] 80 FR 67847 (*For waste streams where the final rule establishes numeric effluent limitations or standards, effluent limitations or standards for all POCs are not necessary to ensure that the pollutants are adequately controlled because many of the pollutants originate from similar sources, have similar treatability, and are removed by similar mechanisms. Because of this, it is sufficient to establish effluent limitations or standards for one or more indicator pollutants, which will ensure the removal of other POCs.*)

VI. The Majority Opinion erred in finding that the Franklin Circuit Court had jurisdiction over this matter.

The Franklin Circuit Court never obtained jurisdiction over this appeal, rendering its Order void and requiring the Court of Appeals' decision to be reversed. Appellees filed their initial appeal in the Trimble Circuit Court. However, under KRS 224.10-470, the Franklin Circuit Court has exclusive jurisdiction over appeals from final orders of the Cabinet concerning KPDES permits.[64] Where grace to appeal an administrative decision is granted by statute, compliance with statutory requirements is jurisdictional and strict compliance is required.[65] Thus, the Trimble Circuit Court had no jurisdiction over the appeal. It should have dismissed this action. Instead, it transferred it to the Franklin Circuit Court.

Both the lower court and the Majority Opinion characterized this as a question of venue, rather than jurisdiction, and thus found that transfer was the appropriate remedy under KRS 452.105. The Circuit Court improperly relied on *Jent v. Commonwealth*[66] to hold that the case was preserved by KRS 413.270(1), the so-called "savings statute." However, the savings statute applies only when the matter has been dismissed by a judgment of the court finding lack of jurisdiction, and offers the aggrieved party the opportunity to file the matter in the correct court. This is not analogous to the situation at hand, where there was no judgment of dismissal, but merely an improper transfer.

The Majority Opinion also incorrectly found that this was a question of venue, relying on the idea that Kentucky has a unitary circuit court system based in large part on

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[64] "Appeals may be taken from all final orders of the Energy and Environment Cabinet. Except as provided in subsection (3) of this section, the appeal shall be taken to the Franklin Circuit Court within thirty (30) days from entry of the final order." KRS 224.10-470 (where subsection (3) deals specifically with appeals of industrial energy permits).

[65] *See Louisville Gas & Elec. Co. v. Hardin & Meade Cnty. Prop. Owners*, 319 S.W.3d 397, 400 (Ky. 2010)

[66] 862 S.W.2d 318 (Ky. 1983)

Commonwealth, ex rel. Conway v. Thompson.[67] That case is distinguishable because it did not concern a court's ability to hear and decide a matter in which jurisdiction has been specifically vested elsewhere by statute, but rather an issue of injunctive authority granted by a statute of general jurisdiction. In fact, the Court's opinion in *Commonwealth, ex rel. Conway v. Thompson* specifically distinguishes the holding from the fact pattern in this matter when it states in its examination of the jurisdiction question, "No party has cited any statute or regulation that required this type of action to have been brought only in the Franklin Circuit Court. The lack of such authority is important because the General Assembly could easily have required this type of action to be brought in the Franklin Circuit Court, as it has done in other types of actions. Instead, the General Assembly expressly authorized any 'court of record of this Commonwealth having general jurisdiction' to issue a declaratory judgment."[68] For KRS 224.10-470, the General Assembly did require the action to be brought exclusively in the Franklin Circuit Court, thus completely distinguishing this action from that contemplated by the case cited by the Majority.

Courts have held that "when a statute designates a particular court with authority to judicially review the decision of an administrative agency, a question of subject matter jurisdiction rather than venue is involved."[69] This Court has upheld this distinction time and again, requiring strict compliance with statutory jurisdictional requirements.[70] Additionally, the Majority Opinion stands in opposition of its own previous ruling on this

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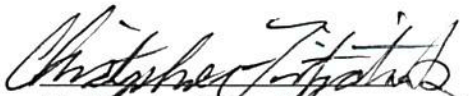
[67] 300 S.W.3d 152, 162-163 (Ky. 2009)
[68] *Id.* at 163
[69] *Health Enter. Of Am., Inc. v. Dept. of Social Servs.*, 668 S.W.2d 185, 187 (Mo. App. 1984).
[70] *See Taylor v. Ky. Unemployment Ins. Comm'n*, 382 S.W.3d 826, 831 (Ky. 2012); *Louisville Gas & Elec. Co. v. Hardin & Meade Cnty. Prop. Owners*, 319 S.W.3d 397, 400 (Ky. 2010).

precise statute, KRS 224.10-270, in *Shewmaker v. Commonwealth.*[71] In that matter, an appeal under KRS 224.10-470 was filed in the Spencer Circuit Court, which then dismissed the matter due to a lack of subject matter jurisdiction. The Court of Appeals upheld that dismissal.

It is clear here that the Trimble Circuit Court is not empowered to act on this matter by KRS 224.10-470, and thus it should have dismissed the matter. The Court of Appeals' own precedent even demands it. However, it instead effectuated an improper transfer to the Franklin Circuit Court in an attempt to grant a power of jurisdiction it did not have the right to convey. As such, the appeal was never properly filed, the Franklin Circuit Court lacked power to decide the matter, and the Court of Appeals erred in affirming.

CONCLUSION

For all the foregoing reasons, the rulings of the Court of Appeals and the Franklin Circuit Court should be REVERSED, and the Order of the Secretary should be AFFIRMED.



Christopher Fitzpatrick

[71] 30 S.W.3d 807